DATE ISSUED: March 24, 1995

CASE NO: 94-CER-2

In the Matter of

DAVID HERMANSON,

Complainant,

v.

MORRISON KNUDSEN CORPORATION,

Respondent.

APPEARANCES:

Mick G. Harrison, Esquire
Richard E. Condit, Esquire (On brief)
Greenlaw, Inc.
P.O. Box 77463
Washington, D.C. 20013-7463
For the complainant

Gregory Ferguson, Esquire
321 S. Martin
Little Rock, AR 72205
For the complainant

Charles R. Nestrud, Esquire
Janie W. McFarlin, Esquire
Chisenhall, Nestrud & Julian
2440 First Commercial Bank Bldg.
400 W. Capitol
Little Rock, AR 72201
For the respondent

BEFORE: DONALD W. MOSSER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under the employee protection provisions of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9610 and the regulations promulgated thereunder, 29 C.F.R. Parts 18 and 24.[1]

Complainant, David Hermanson, timely filed a complaint with the Secretary of Labor on March 31, 1994. The Secretary, through his duly authorized agents, investigated the complaint and determined that there was no reasonable cause to believe that Morrison Knudsen Corporation discriminated against Mr. Hermanson in terminating him on March 1, 1994. By telegram dated May 6, 1994, complainant opposed the findings of the Secretary and appealed his determination to the Office of Administrative Law Judges.

I conducted a formal hearing in this matter on July 20 through July 22, 1994, at Little Rock, Arkansas. The parties were afforded the opportunity to present documentary and testimonial evidence at this hearing.[2] The record was left open until September 19, 1994, for the resolution of evidentiary questions. Counsel timely filed original and reply briefs by the January 21, 1995 due date.[3]

ISSUES

1. Whether the complaint filed by David Hermanson falls within the jurisdiction of federal environmental statutes other than CERCLA;

2. Whether complainant's employment at Vertac involved activity protected by the applicable environmental statutes, and if so, whether his termination by the respondent constitutes discrimination because of that activity.

FINDINGS OF FACT

Morrison Knudsen Corporation (MK) was incorporated in Delaware in 1932 and maintains its principal executive offices at Boise, Idaho. This company principally has operated in two industries, engineering/construction and rail systems, but in the last decade has become involved in environmental cleanup and remediation. MK is a party in this proceeding because of its interest in the operation of a dioxin-disposition facility at Jacksonville, Arkansas. (CX 41A-C; DX 38; Tr. 783-785).

MK was authorized in 1990 by the Arkansas Department of Pollution Control and Ecology to operate the first dioxin-disposition facility in the United States. (Tr. 788-790; DX 38). It entered into a joint venture known as Vertac Site Contractors (VSC) with MK being the

---

[1]Complainant maintains that this proceeding also arises under other federal environmental statutes. This aspect of jurisdiction is contested by the respondent and will be addressed in this decision.

[2]References to ALJX, CX and DX respectively pertain to exhibits of the administrative law judge, complainant and Morrison Knudsen Corporation. The transcript of the hearing is cited as Tr. and by page number.

[3]Both parties waived the time constraints of 29 C.F.R. §§ 24.5(a) and 24.6. *See also* 42 U.S.C. § 9610(b). (ALJX 3, 4).

lead company because it provides the expertise, personnel and funding for the operation of the facility. The venture involves the operation of an incinerator to dispose of organic hazardous waste contained in over 25,000 drums which were abandoned at the Vertac site by the Vertac Chemical Corporation and its predecessors. (CX 41A; DX 38; Tr. 784).

The United States Environmental Protection Agency (EPA) took control over the Vertac site in 1993 because the location has been designated a Superfund site. (Tr. 785, 786). It is responsible for constantly monitoring ambient air around the site to assure no harmful exposure to the dioxin being incinerated. (Tr. 787; DX 38). This agency contracted the operation of the incinerator and the actual monitoring work at Vertac to URS Consultants (URS), Denver, Colorado. (Tr. 215, 697, 785). URS subcontracted the operation of the incinerator to VSC. (Tr. 215, 785). VSC must comply with the requirements of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA) in operating the incinerator facility at Vertac. (Tr. 21, 794, 847-848; CX 9, 42).

VSC only has control of about two acres of the 93 acre Vertac site. This principally consists of the incineration area, the drum handling building, the tank storage area (tank farm), and four trailers in which offices are located. The incinerator process starts in the drum handling building where the liquid and solid waste materials are separated with the liquids being drained to a neutralization tank. The solid waste drums are taken by conveyor/elevator to a slow-speed shredder where the drums are reduced to small pieces and sent to a solid storage hopper. The solid and liquid waste is next taken to the thermal treatment center, which includes a rotary kiln, dual cyclones and afterburner. The waste products primarily are destroyed in this incineration process but the remaining waste, in the form of gases from the afterburner, is further processed by air pollution control equipment in the off-gas treatment system. The dry salt produced in the off-gas treatment is further processed through a reverse pulse baghouse assembly, then discharged into decontaminated drums for storage. The remaining gases are further processed then discharged by a centrifugal fan. (DX 38; Tr. 790-791, 793-794).

Complainant commenced his employment with VSC at the Vertac site in the early 1990's. He worked as a laborer at various job locations at Vertac including the drum handling building, with the decontamination unit and in the baghouse assembly area. (DX 3, 4, 11, 12, 15, 16, 17, 38; Tr. 203, 254, 327, 413, 439, 448, 563-571, 613, 644). Mr. Hermanson was terminated by VSC on March 1, 1994. The records of VSC indicate the complainant was discharged because of "inattentiveness and negligence while operating the Hotsy spray washer", in violation of the company's safety rules. (DX 17).

VSC has developed an operation instruction or standard operating procedure (SOP) for the use of the Hot Water Spray Washer (Hotsy) by VSC laborers. (DX 19). A Hotsy is used at Vertac to clean and decontaminate equipment, tools and metal. It is designed to spray water at an extremely high pressure of up to 3,500 pounds per square inch, although it is normally used at around 2,500 pounds per square inch at the Vertac site. The Hotsy has a spray wand, which is about three to four feet in length. An operator holds the wand in two hands, with one positioned in the area of a trigger-like device which releases or controls the water flow. The wand is connected by a hose to a portable pump and compressor which provide the power for the water spray. (DX 27; Tr. 484-487).

Mr. Hermanson was involved in incidents with the Hotsy prior to the day of his termination. While working in the decontamination unit on July 29, 1993, he and a co-worker agreed to spray each other with the Hotsy in an effort to "cool down" on an extremely hot day. (Tr. 151, 203, 204, 213, 458, 478). The project manager observed the co-worker spraying Mr.

Hermanson, who was dressed in a polyethylene suit, air purifying respirator, gloves and boots. Initially, the safety manager thought the complainant and his co-worker should be fired for the incident. (Tr. 458). The spraying of a human body with the Hotsy is a violation of the SOP applicable to the operation of that equipment and can constitute an intentional violation of a written safety rule which justifies termination of an employee under VSC's rules of conduct. (DX 18, 19; Tr. 152, 153, 204, 205, 265, 722, 916).

After further discussing the June 29, 1993 Hotsy incident with the supervisor of the complainant, VSC's safety manager decided against discharging the employees. (Tr. 459-460). Instead, Mr. Hermanson and his co-worker were assessed 50 points under VSC's disciplinary system for a major violation of a written safety rule and told they would be fired if the violation was repeated. (DX 12, 18; Tr. 205, 460, 461). These employees also were advised that the disciplinary points would be removed if the violation did not happen again within 90 days but that the violation would remain in their personnel files. (DX 12). The supervisor also retrained these employees in the use of the Hotsy and required them to again read the SOP regarding this equipment. (DX 12; Tr. 206, 460).

VSC's management developed rules of conduct for the employees at Vertac in an attempt to promote a more uniform disciplinary system for the handling of unsatisfactory conduct. (Tr. 811-813). Under this system, employees can be assessed points for improper conduct ranging from 10 points for using abusive language up to 100 points for such things as an intentional violation of a safety rule, negligence resulting in injury, insubordination and a deliberate violation of compliance rules. If an employee accumulates 20 to 50 points within a 90 day time period, the immediate supervisor is required to meet with the employee and the union steward to review the employee's file and discuss corrective action. The accumulation of 75 points within 90 days can result in a 1 to 5 day suspension without pay. Assessment of 100 points within 90 days results in termination of the employee by the project manager or his designated representative. Ninety days following an incident for which an employee is assessed points, the points applicable to that incident are dropped from the point total but the record of violation remains in the employee's personnel file. (DX 18; Tr. 261).

Mr. Hermanson was involved in another incident with the Hotsy on October 19, 1993. He was working in the decontamination unit at the time and was operating a forklift. He attempted to transport the Hotsy on the front of the forklift but the Hotsy fell and was severely damaged. No points were assessed against the complainant under VSC's disciplinary program but a safety violation notice was prepared by VSC's personnel regarding the incident in which Mr. Hermanson's operation of the forklift was described as negligent. Complainant also was verbally reprimanded and all of his operator licenses were revoked. (DX 16; Tr. 564-565, 571-572, 725-726).

There were no witnesses to the Hotsy incident involving Mr. Hermanson on March 1, 1994, which led to his termination. (Tr. 264-265, 272, 277, 424-425, 463). He was working in a decontamination area under the baghouse of the thermal destruction unit on that day and was involved in cleaning and decontaminating small pieces of metal with the Hotsy. In cleaning/deconning a round metal pipe, which was about 1-1/2 feet long, complainant sprayed his left boot with the Hotsy. (Tr. 417). The high pressured water spray pierced complainant's rubber boot and socks and punctured Mr. Hermanson's left foot in the center immediately behind his toes. (Tr. 413-421, 464-465; DX 17).

Mr. Hermanson was helped by co-workers to the safety trailer on the Vertac site for first-aid treatment. (Tr. 415, 424). While there he discussed the incident with his supervisor and alleged that the injury occurred because he evidently grabbed the trigger in picking up the spray

wand causing the water to strike his boot in a swiping or glancing motion. (Tr. 263, 268-269, 415). The supervisor returned to the decontamination area where the incident occurred and examined the spray wand and the pipe which was being cleaned at the time of the incident. (Tr. 266, 417). The supervisor conducted a further investigation, including inspecting the torn boot, spraying other boots with the Hotsy in various manners and discussing the situation with others. (Tr. 418-420). He concluded from the investigation that the complainant must have had his foot on the pipe in cleaning it with the Hotsy and this resulted in the injury. (Tr. 331). His report regarding the incident was completed later that morning. (DX 17; Tr. 422-423, 428).

VSC's safety manager discussed the March 1, 1994 Hotsy incident with the complainant, his supervisor and the operations manager. (Tr. 262). After completion of the supervisor's investigation, the safety manager recommended to the project manager that Mr. Hermanson be terminated for an intentional safety violation in the use of the Hotsy. The project manager concurred with the safety manager's recommendation and Mr. Hermanson was assessed 100 points under VSC's disciplinary system for an intentional violation of a safety rule. (Tr. 261, 263, 267, 280, 814, 828-829, 906). The safety violation notice regarding the matter provides that Mr. Hermanson demonstrated "inattentiveness and negligence while operating the Hotsy spray washer" and that he had shown repetitive "carelessness while operating equipment on site." (DX 17).

After advising Mr. Hermanson that he was being terminated because of his safety violation, the safety manager transported the complainant to a physician for treatment of the foot injury. (Tr. 270). The physician cleaned rubber fragments from the complainant's puncture wound and apparently gave him an injection. (DX 17). Mr. Hermanson continued to receive medical treatment for the injury on several occasions until he was released by the physician on May 6, 1994. (DX 17; Tr. 767, 768).

Mr. Hermanson expressed safety concerns about the Vertac incineration facility to co-workers while employed at VSC. (Tr. 196, 197, 500, 569-570, 644, 675, 689). On one occasion, he asked a co-worker, who was a safety technician for VSC, whether a full-time physician was needed at the Vertac site. (Tr. 569, 570). To other co-workers, one of whom was a laborer serving on the safety council at that time, he expressed concern regarding the decontamination procedures (wipe samples) being conducted on bottles which were to be taken off the Vertac site. (Tr. 196, 197, 455).

Complainant also occasionally raised questions as to whether his equipment was sufficient to protect him from the decontamination level of the waste being handled. Once, he requested that his supervisor allow him to wear an air purifying respirator in performing a task and the supervisor refused. The project manager overheard the conversation and told the supervisor that the complainant was to be allowed to wear the personal protective equipment in which he felt comfortable. (Tr. 872-873). It is VSC's unwritten policy that employees are always allowed to upgrade their protective equipment if they have safety concerns. (Tr. 208, 356, 649-650, 673-674, 710-711, 751-752).

Mr. Hermanson was present at other times when safety concerns were raised and investigated. On one occasion, complainant was working with his supervisor when another employee, who was operating the forklift, caused that equipment to lift a portion of a protective liner that was about two inches under the surface of the ground. (Tr. 448). Mr. Hermanson expressed concern that the liner was installed to prevent waste from penetrating the soil in the event of a major waste spill. (Tr. 449). The supervisor discussed the matter with a safety compliance officer of VSC and it was decided to cut off the exposed portion of the liner and dispose of it with the waste materials. The liner was not a ground water protection liner. It was

installed to keep gravel from settling and to prevent vegetation from growing in the area. (Tr. 448-450, 468-470, 622-624, 637-638, 859, 940).

Complainant was present when his supervisor, a safety compliance officer and the safety manager discussed decontaminating some equipment (shredder teeth) outside of the drum handling building. It was first decided to use a torch rather than the Hotsy to remove some contaminated salt from the equipment. When this produced some black smoke, the safety manager decided the task should be moved inside the drum handling building in which negative air pressure is maintained. (Tr. 446-448, 620-622).

Mr. Hermanson was involved in emptying an aqueous waste tank with other employees on February 18, 1994. (Tr. 646). His supervisor and the operations officer discussed the procedure for cleaning/decontaminating the drums and equipment used on this job. (Tr. 647, 651). Complainant's supervisor and the operations officer decided during the work that the procedure should be changed to reduce the amount of water being generated by the cleaning process. (Tr. 647-655).

During the emptying of the aqueous waste tank, a VSC employee was driving a forklift and transporting a pallet of four drums of waste material from the tank farm area to the drum handling building. (Tr. 616-617). One of the drums fell to the ground, its top came off, and approximately one-half of the contents spilled into a gravel area. (Tr. 618-619). The contents and surrounding gravel were promptly cleaned and placed into a drum for disposal. The safety compliance officer, who supervised the project, prepared a report regarding the incident on that same day and sent it to VSC's administrative office. (Tr. 619, 620, 624-629, 630, 636, 840. 841; CX 22).

URS has four shift engineers working at the Vertac site to oversee the operation of the incinerator. They make inspections of the physical plant to check the operation of the facility, observe the actual operation from the control room, inspect the log books to verify the kind of activities being performed and prepare reports regarding the operation of the incinerator. Their purpose in being there is to provide skilled observation of the Vertac incinerator for the EPA and assure the facility is being operated in compliance with the permit. This requires them to investigate safety concerns. (Tr. 215-216).

The shift engineer working on February 18, 1994 left a report in his log book regarding the waste spill. (Tr. 221). On Tuesday, February 22, 1994, which was the first regular work day following the spill, another shift engineer was advised of the incident by his supervisor. (Tr. 221, 233). This shift engineer discussed the matter with the control room operator and VSC's safety manager. (Tr. 226, 232, 234-235). The shift engineer further investigated the incident by talking to the employee who was operating the forklift on February 18 and the safety technician on duty that day. (Tr. 233). He also inquired of the complainant who was working in the tank farm area on February 22, if Mr. Hermanson could give him some details regarding the spill. (Tr. 222, 224, 225, 243). The complainant told him he was aware of the spill but could provide no information. (Tr. 222, 224, 225, 242, 243, 248-249). The shift engineer submitted a written report to his supervisor on the following day in which he described the incident and concluded that it was properly handled. (DX 21; Tr. 233-234, 241).

VSC's management conducts monthly safety meetings with the employees at Vertac. (Tr. 695). Management told the employees on at least one occasion that they should not be working at VSC unless they intended to follow company rules. (Tr. 862, 941). This and other similar statements were interpreted by some of the VSC employees as a "hit the gate" policy if they raised a safety concern to management. (Tr. 198, 369, 379, 445, 547).

Employees also were told by VSC management to be specific in explaining incidents in written reports. (Tr. 371-372, 869). This was done to avoid the use of vague adjectives in describing an incident which could cause someone to misunderstand the severity of the incident. (Tr. 869-870). Also, URS and VSC's management instructed VSC laborers not to talk to URS personnel about incidents. (Tr. 379, 801). Instead, certain VSC employees were designated to be contact persons for URS personnel, depending on the nature of the information being requested. This policy was implemented also to avoid any confusion regarding the reporting of incidents and to reduce the time spent by employees in communicating on such matters. (Tr. 802).

David Hermanson was considered by some of his co-workers and management to be a good worker. (Tr. 202, 259, 457, 563, 613, 815). However, some questioned his mechanical aptitude and others felt he did not follow directions well or needed specific directions so as to avoid problems. (Tr. 259, 357-358, 457, 613, 616, 644-645). Some of his co-workers considered Mr. Hermanson to be unsafe. (Tr. 202, 406-407, 563-564, 568, 660, 741, 816). VSC's personnel records indicate the complainant committed the following conduct or safety violations, in addition to the ones described above:

DATE	VIOLATION	DISCIPLINARY ACTION
6/8/91	Failure to tape up personal protective equipment as instructed/left exposed to serious injury	Verbal warning
12/7/91	Failure to label salt drums and read applicable SOP	Verbal reprimand
1/8/92	Failure to wear proper personal protective equipment as prescribed by task permit	Verbal reprimand
3/5/92	Reported to work unshaven (safety violation)	Verbal warning
3/6/92	Poor work due to negligence and not adhering to SOP	Verbal warning
5/27/92	Failure to wear proper personal protective equipment in cleaning and deconning kiln slab	Verbal warning

DATE	VIOLATION	DISCIPLINARY ACTION
5/28/92	Handling contaminated material without gloves/washing hands in water that could be contaminated	Verbal warning
6/23/92	Excessive break periods	Verbal warning

7/13/92	In exclusion zone not wearing proper safety equipment	Verbal warning
7/21/92	Reporting to work unshaven (safety violation)	Verbal warning
7/22/92	Refusal to obey orders and unsatisfactory job performance/ outside assigned work and smoking area	Written memorandum of employee deficiency
11/28/92	Poor work due to negligence and unsatisfactory job performance/overfilled fuel tank during refueling operations	Written memorandum of employee deficiency
3/31/93	Respirator found on control room porch covered in salt	Verbal warning
3/31/93	Blowing salt off his personal protective equipment with air hose	--
3/31/93	Not wearing respirator on site	Written warning
8/5/93	Absence from work	Assessed 15 points
9/13/93	Absence from work	Assessed 15 points
10/15/93	Operating back hoe in negligent and careless manner/accident avoided by alertness of co-worker	Assessed 30 points and driver's license for equipment revoked

(DX 1-11, 13-15; Tr. 350-356, 566-568, 661-673, 677-679, 682-684, 846-848).

There were approximately 130 incidents at the Vertac site which resulted in first-aid being administered to VSC personnel in 1993. Mr. Hermanson received more first-aid treatment in that year than any other employee. His visits to first-aid amounted to 10 percent of the total first-aid treatments for VSC employees in 1993. (Tr. 733).

David Hermanson was not the first person injured or fired by VSC because of an incident involving a Hotsy. A couple of years prior to the complainant's injury, another worker was holding down a tool with his foot and spraying the tool with a Hotsy. In doing so, he sprayed his boot and the pressurized water penetrated his foot. The accident caused management to review

the SOP applicable to the Hotsy and led to the directive that employees were forbidden to use their feet to hold down tools, etc. to clean them with the Hotsy. (Tr. 835-836).

Another VSC employee took a Hotsy inside the drum handling building and was using it to wash off his gloves. This resulted in an incision in his hand. VSC management fired the employee for pointing the Hotsy at a body part, which is a violation of the applicable SOP. (Tr. 863-864; DX 19).

CONCLUSIONS OF LAW

Jurisdiction

The complainant, David Hermanson, asserts that the Department of Labor has jurisdiction over his whistleblower discrimination complaint under several federal environmental statute employee protection provisions. The statutes under which the complainant contends his activities are protected are the Resource Conservation and Recovery Act (RCRA, also known as the Solid Waste Disposal Act or SWDA), 42 U.S.C. § 6971; the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund), 42 U.S.C. § 9610; the Clean Air Act (CAA), 42 U.S.C. § 7622; the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9(i); the Toxic Substance Control Act (TSCA), 15 U.S.C. § 2622; and the Clean Water Act (CWA), 33 U.S.C. § 1367. The respondent, Morrison-Knudsen Corporation, concedes jurisdiction under CERCLA but disputes jurisdiction under all the other environmental statutes.

Mr. Hermanson was an employee at the Vertac Superfund site at Jacksonville, Arkansas. The Environmental Protection Agency took responsibility for the clean-up of the site in 1993. The removal action being undertaken is governed by CERCLA, and the respondent contends that the provisions of CERCLA, together with its regulations, control operations at the site. Respondent asserts that the other environmental statutes do not apply to the site substantively, but apply only as "applicable or relevant and appropriate requirements" (ARARS) insofar as disposal and treatment of the waste is concerned. *See State of Ohio v. United States Environmental Protection Agency*, 997 F.2d 1520 (D.C. Cir. 1993). The respondent asserts that the substantive provisions of the other environmental statutes do not apply to CERCLA sites.

Complainant, in his reply brief, contends that the respondent's reliance on the *Ohio* case is misplaced, because the employee protection provisions of the environmental laws are substantive requirements which CERCLA does not contravene. Also, the *Ohio* case does not mention the employee protection provisions of the environmental laws. The complainant argues that the Federal Facilities Compliance Act requires the site to comply with "all Federal, State, interstate, and local requirements, both substantive and procedural." 42 U.S.C. § 6961. Therefore, complainant argues that the substantive protections provided through the employee protection provisions of the environmental laws apply to CERCLA sites like Vertac.

The respondent also asserts that there is no authority which supports the proposition that the other environmental statutes, specifically their employee protection provisions, afford me jurisdiction over the complainant's case. However, the Secretary of Labor has held that there is broad jurisdiction under whistleblower provisions of environmental statutes. *See Jenkins v. U.S. EPA*, Case No. 92-CAA-6, (Sec. Dec. and Order, May 18, 1994); *Minard v. Nerco Delamar Co.*, Case No. 92-SWD-1, (Sec. Dec. and Order, Jan. 25, 1994). The D.C. Circuit makes clear that the ARARs are limited to substantive standards that remedial actions must meet. *Ohio*, 997 F.2d at 1527. CERCLA explicitly provides that "any standard, requirement, criteria, or limitation under an Federal Environmental Law, . . . is legally applicable to the hazardous substance or pollutant or contaminant concerned or is relevant and appropriate under the circumstances of the

release or threatened release of such hazardous substance or pollutant or contaminant." 42 U.S.C. § 9621(d)(2)(A). Therefore, although the Vertac site is a Superfund site, it must also comply with the substantive provisions of the other applicable environmental statutes. The court in the *Ohio* case did not address the employee protection provisions of the environmental statutes, but since the substantive provisions of those statutes apply to the Vertac site, it follows that the employee protection provisions also apply. It makes sense that if the provisions relating to the disposal and treatment of waste apply to Superfund sites, the employee protection provisions also apply, because those provisions protect employees who report violations regarding, *inter alia*, disposal and treatment of waste.

In the *Jenkins case*, Case No. 92-CAA-6, the Secretary noted that "the employee protection provisions of the environmental statutes at issue afford protection for participation in activity in furtherance of the statutory objectives and have been construed broadly." The Secretary also indicated that CERCLA and SDWA contemplate broad coverage. The complainant in *Jenkins* brought her claim under the employee protection provisions of several environmental statutes, including CERCLA, SDWA, CAA, CWA and SWDA. Implicit in the Secretary's decision is that a complainant can assert jurisdiction under all of these statutes in the same proceeding, if the complainant participated in activities in furtherance of the objectives of all the statutes. The Secretary specifically noted that "the manner in which EPA manages the cleanup of a Superfund site may result in contaminated drinking water." *Jenkins*, Case No. 92-CAA-6, FN 2.

In *Minard v. Nerco Delamar Co.*, Case No. 92-SWD-1, (Sec. Dec. and Order, Jan. 25, 1994), the Secretary held that where the complainant has a reasonable belief that a particular substance is hazardous and regulated as such, he is protected under SWDA. The complainant in that case believed that used motor oil and antifreeze were protected under the SWDA, but, in fact, they were not protected. The Secretary held that it was reasonable, given Mr. Minard's training and experience, to believe that used motor oil and antifreeze were hazardous wastes subject to EPA regulations. Although the complainant's actions were not protected under that statute, his reasonable belief that they were protected gave way to jurisdiction under the act. Again, the Secretary took a broad view of jurisdiction in a whistleblower proceeding.

Applying the *Jenkins* and *Minard* rationale to Mr. Hermanson's complaint, I believe it is reasonable to conclude that environmental statutes other than CERCLA are applicable to VSC's operation at Vertac. It is indeed established by the evidence that VSC also must comply with the requirements of RCRA in operating its incinerator at this Superfund site. Unlike the complainant involved in *Jenkins*, however, I cannot conclude from the evidence presented to me that VSC's operation is governed by any other environmental statute or whether David Hermanson participated in activities in the furtherance of the objectives of any other environmental statute. I therefore conclude from the evidence and arguments presented to me that the complainant has established that I have jurisdiction over Mr. Hermanson's whistleblower discrimination complaint under CERCLA and RCRA.

Protected Activity/Discrimination

As I previously indicated, this case arises under CERCLA and RCRA, as David Hermanson was employed as a laborer for VSC at its Superfund site at Jacksonville, Arkansas. Mr. Hermanson contends he was terminated by VSC because of his expression of safety concerns regarding that company's operation of its incinerator facility at the Vertac site.

Section 9610(a) of CERCLA provides that:

> No person shall fire or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has provided information to a State or to the Federal Government, filed, instituted, or caused to be filed or instituted any proceedings under this chapter, or has testified or is about to testify in any proceeding resulting from the administration of enforcement of the provisions of this chapter.

42 U.S.C. § 9610(a).

The other environmental statute applicable to this proceeding contains similar employee protection provisions. *See* 42 U.S.C. § 6971(a). Also, the regulations pertaining to employee complaints based on these statutes provide at 29 C.F.R. § 24.1 that:

> (b) Any person is deemed to have violated the particular federal law and these regulations if such person intimidates, threatens, restrains, coerces, blacklists, discharges or in any other manner discriminates against any employee who has:
>
> (1) Commenced, or caused to be commenced, or is about to commence or cause to be commenced, a proceeding under one of the Federal statutes listed in § 24.1 or a proceeding for the administration or enforcement of any requirement imposed under such Federal statute;
>
> (2) Testified or is about to testify in any such proceeding; or
>
> (3) Assisted or participated, or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of such Federal statute.

29 C.F.R. § 24.2(b).

It is well-established that for a complainant to prove a *prima facie* case under the whistleblower statutes, the evidence must prove that the complainant was engaged in a protected activity, that the employer took adverse action against the complainant, and that the employer was aware of the protected activity when it took such action. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). Complainant must also present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. As pointed out by complainant's counsel in this case, direct evidence is not required for a finding of causation. The presence or absence of a retaliatory motive is provable by circumstantial evidence even if witnesses testify that they did not perceive such a motive. *Ellis Fischel State Cancer Hosp. v. Marshall*, 629 F.2d 563, 566 (8th Cir. 1980), *cert. denied*, 450 U.S. 1040 (1981). If a complainant satisfies this requirement, then the evidentiary burden shifts to the employer to prove that the adverse action was taken against the employee for a legitimate, non-discriminatory reason. *McCuistion v. Tennessee Valley Authority*, 89-ERA-6 (Sec'y Dec. and Order, Nov. 13, 1991). Assuming the respondent meets this burden, the complainant must present evidence to show that either the proffered reason for the adverse action was pretextual or that the respondent had a dual motive for the adverse action in that the employer also was motivated by retaliation for the employee's protected activity. *See NLRB v. Wright Line, a Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), *aff'd* 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982);

Mackowiak v. University Nuclear Systems, Inc., Case No. 82-ERA-8 (Sec'y Dec. and Order, April 29, 1981), *remanded on other grounds*, 735 F.2d 1159 (9th Cir. 1984).

Protected Activity

Complainant is portrayed by his counsel as the safety "watchdog" during his employment at the Vertac site. In his original brief, his attorneys argue that Mr. Hermanson was involved in 18 incidents which constitute protected activity under the whistleblower statutes. However, none of these incidents involved giving information directly to government personnel or agencies. Moreover, there is no evidence that prior to the filing of the complaint involved in this proceeding that Mr. Hermanson "filed, instituted, or caused to be filed or instituted any proceeding under" environmental statutes, "or has testified or was about to testify in any proceeding regarding the administration and enforcement" of the environmental statutes. *See* 42 U.S.C. § 9610(a). Therefore, there is no evidence that complainant's expression of safety concerns while employed at Vertac meets the literal protected activity requirements of the pertinent environmental statutes and regulations.

Complainant is correct in arguing that the whistleblower provisions of the federal environmental statutes and regulations have been liberally construed. Indeed, they should be since they were enacted to encourage employees to report safety concerns or violations under the various environmental statutes. *See, e.g. Mackowiak v. University Nuclear Systems, Inc.*, Case No. 82-ERA-8 (Sec'y Dec. and Order, April 29, 1983, Slip Op. at 8-10), *remanded on other grounds*, 735 F.2d 1159 (9th Cir. 1984). Thus, it is clear that a literal interpretation of the requirements of the employee protection provisions of the environmental statutes is not intended.

Complainant alleges that on two occasions he raised safety concerns to a URS shift engineer. EPA contracted to URS the responsibility to operate a dioxin-disposition facility, as well as the responsibility to monitor the ambient air around the site. URS then subcontracted the responsibility for the operation of the incinerator to VSC. URS shift engineers are present at the Vertac site to monitor VSC's operation of the incinerator. Therefore, the raising of safety concerns by employees of VSC to URS shift engineers constitutes an indirect expression of a safety concern to EPA. It therefore follows that the raising of such safety concerns represents activity protected by the applicable environmental statutes.

Mr. Hermanson essentially alleges through counsel that he was responsible on February 22, 1994 for bringing the February 18 waste spill to the attention of the URS shift engineer. He contends that the shift engineer heard him request the unusual incident report from the control room operator and that the shift engineer had no knowledge of the incident. According to Mr. Hermanson, the shift engineer then approached the complainant about the matter but complainant told him he could not disclose any information because his job would be in jeopardy. It is also the position of Mr. Hermanson that the unusual incident report was not available on the 22nd and that the report appears to be backdated.

Complainant's allegations regarding the February 18 and 22 events simply are not corroborated. In fact, there is credible evidence in the record directly contradicting Mr. Hermanson's testimony in this regard. The URS shift engineer, who worked on February 22, credibly testified that he was informed of the spill by his supervisor. Moreover, Mr. Hermanson was not in the control room when the shift engineer discussed the matter with the operator. Indeed, there is evidence that the person who complainant alleges was the control room operator was not even working on that date and that the shift engineer discussed the spill with another operator. Finally, the shift engineer testified that he asked the complainant about the spill and was informed that Mr. Hermanson did not have any information to offer. Regardless of the arguments made by counsel in complainant's reply brief, the shift engineer clearly was of the impression that the complainant did not have any information regarding the spill rather than that he was afraid to offer information for fear of retaliation by VSC. I should also note that credible testimony proves

the unusual incident report concerning the spill was prepared on February 18, 1994 and was not backdated.

I find the evidence offered on this incident does not prove that Mr. Hermanson raised a safety concern to URS personnel. In fact, complainant's allegations regarding this event, together with other matters which I shall discuss, lead me to conclude that David Hermanson was not a credible witness. I therefore am constrained not to accept his other allegations of protected activity unless they are corroborated by other evidence in the record. Of course, the findings of fact foreshadowed this conclusion.

Mr. Hermanson also alleged that he raised another safety concern to the same shift engineer shortly after the complainant began working at the Vertac site. Specifically, he contends that he asked for information about the effects of salt and ash which the complainant was handling on a routine basis. However, the shift engineer credibly testified that this inquiry never took place. (Tr. 240). There is no other evidence in the record to corroborate the complainant's testimony. I therefore find that David Hermanson did not raise any external safety concerns which could be construed as protected activity.

There is evidence that the complainant did express safety concerns to VSC personnel. The Secretary of Labor has consistently held that an employee who makes internal safety complaints is protected under the whistleblower provisions of environmental statutes. *Goldstein v. Ebasco Constructors Inc.*, Case No. 86-ERA-36 (Sec'y Dec. and Order April 7, 1992), *rev'd sub. nom,. Ebasco Contractors, Inc. v. Martin*, No. 92-4576 (5th Cir. Feb. 16, 1993) *per curiam*; *Willy v. The Coastal Corporation*, Case No. 85-CAA-1 (Sec'y Dec. and Order June 4, 1987); *Mackowiak v. University Nuclear Systems, Inc.*, Case No. 82-ERA-8 (Sec'y Dec. and Order April 29, 1983), *aff'd*, 635 F.2d 1159 (9th Cir. 1984). While the Fifth Circuit Court of Appeals disagrees with the Secretary's position, the Secretary has continued to adhere to his holding on internal complaints even in that circuit. *See Brown & Root, Inc. v. Donovan*, 747 F.2d 1029, 1031-1036 (5th Cir. 1984); *Goldstein, supra*. In fact, the Secretary noted in the *Goldstein* opinion that circuits other than the Fifth Circuit "have held, either explicitly or implicitly, that internal complaints are protected." *Couty v. Dole*, 886 F.2d 147 (8th Cir. 1989) (implicit); *Kansas Gas & Electric Co. v. Brock*, 780 F.2d 1505, 1513 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986) (explicit); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984) (explicit); *Consolidated Edison Co. of New York v. Donovan*, 673 F.2d 61 (2nd Cir. 1982) (implicit). Since this case arises within the jurisdiction of the Eighth Circuit Court of Appeals, I find that I must follow the Secretary's position that Mr. Hermanson's internal safety complaints to VSC can constitute activity protected under the applicable federal statutes and regulations.

Complainant alleged that he expressed concern to management regarding the decontamination of equipment and storage drums during the emptying of the aqueous waste tank on February 18, 1994. However, the credible testimony of the employees in charge of the job prove that Mr. Hermanson's contentions are not accurate. Indeed, they explained their concerns about this job and unequivocally stated that Mr. Hermanson had nothing to do with the raising of any safety questions or any decisions regarding how the procedure should be performed.

Mr. Hermanson also takes credit for raising safety concerns to management about the cleaning of equipment (shredder teeth) in a decontamination area outside of the drum handling building. Again, the credible testimony of the complainant's supervisor and the safety compliance officer contradicts Mr. Hermanson's version of the facts. I find that their testimony establishes that the safety personnel were responsible for deciding how to resolve the potential contamination

problem regarding the shredder teeth and that Mr. Hermanson's involvement in the incident, if any, is not protected activity.

It is maintained by Mr. Hermanson that when he first moved to the decontamination unit he was requested by VSC management to perform improper decontamination testing (wipe samples) on bottles which were to be taken off site. These allegations are contradicted by the credible testimony of the complainant's supervisor and, in fact, lab personnel responsible for such tests indicated that it was not Mr. Hermanson's responsibility to take such samples. It is true that the complainant raised a safety concern regarding this testing procedure to a co-worker/laborer, but I find such complaint does not rise to the level to be considered protected activity under the pertinent environmental statutes.

Mr. Hermanson alleges that he repeatedly raised concerns to management throughout his employment about transporting and using contaminated tools. There simply is no evidence in the record to corroborate the testimony of the complainant in this regard. In fact, one of the supervisors to whom Mr. Hermanson supposedly raised these safety concerns, credibly denied that the complainant ever discussed the matter with him. (Tr. 450).

Complainant argues that he raised several additional safety concerns to management during his employment. These pertain to ripped bags of contaminated waste, oily film on water in the tank farm, explosive level readings in the drum handling building, a waste spill from a rusted drum, inadequacy of the decontamination procedures in triple rinsing plastic overpacks, D-waste and emissions from the auger under the baghouse, the "cool down" procedures following decontamination work and the removal of ash/salt buildup in the spray dryer. There is no testimony or other evidence corroborating any of these allegations of the complainant. While there indeed is evidence that some of the safety concerns were considered during the time the complainant was employed at the Vertac site, such evidence does not prove that Mr. Hermanson was the person responsible for bringing these safety concerns to the attention of management. Since I have found the testimony of Mr. Hermanson is not credible, I am constrained to find that he has failed to prove that he was responsible for raising these internal safety concerns to management.

Despite the voluminous evidence offered in this case, I find that only three incidents have been raised which possibly could be construed as the raising of internal safety complaints by David Hermanson to VSC's management. On one occasion, the complainant inquired of a safety compliance officer if a full-time physician should be employed at the Vertac site. He also expressed concern to his supervisor when a protective liner was torn because he believed it was placed in the ground to protect against a major waste spill. Another time, he was concerned about the level of his personal protective equipment and was allowed by the project manager to wear a respirator after Mr. Hermanson's immediate supervisor had refused the request. These incidents were corroborated by the credible testimony of the other persons involved. The remaining question is whether the concerns raised by Mr. Hermanson rise to the level of being protected by the whistleblower provisions of the environmental statutes and regulations.

Not all internal complaints to management are to be considered protected activity under the environmental statutes. An employee's concerns must be based on incidents which are "reasonably perceived violations of the environmental acts." *Minard v. Nerco Delamar Co.*, Case No. 92-SWD-1 (Sec'y Dec. and Order Jan. 25, 1994). As explained by the Secretary in remanding the case of *Aurich v. Consolidated Edison Co. of New York, Inc.*, Case No. 86-CAA-2 (Sec'y Remand Order April 23, 1987):

> If Complainant has complained that one or more provisions of [EPA regulations dealing with emissions of asbestos to the outside air] had been violated by Respondent, such complaint would appear to be protected . . . . On the other hand, if Complainant's complaints were limited to airborne asbestos as an occupational hazard, the employee protection provisions of the CAA [Clean Air Act] would not be triggered.

It therefore follows that the whistleblower provisions of the various environmental statutes are intended to apply to the expression of environmental concerns rather than general safety concerns. *Minard, supra*, Slip op. at p. 3.

There is no question that two of the proven expressions of concern by Mr. Hermanson to VSC's management pertain to safety. However, his concerns about the inadvisability of having a physician present at Vertac and his ability to upgrade his personal protective equipment appear to be personal or occupational in nature instead of related to protecting the environment. I reiterate that the Secretary of Labor and some of the circuit courts have held that internal safety complaints are protected activity. Interestingly, a close examination of the cases cited by the complainant on this point of law leads one to conclude that the concerns raised in those cases clearly involved potential violations of environmental statutes.

Three of the principal "internal complaint" cases cited by the complainant involved quality control inspectors. In *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984), the quality control inspector talked to officials of the Nuclear Regulatory Commission in regard to an investigation of his employer and the inspector actually made allegations that were investigated by that agency. Similarly, the inspector involved in the case of *Couty v. Dole*, 886 F.2d 147 (8th Cir. 1989), actually threatened to bring safety complaints to the Nuclear Regulatory Commission. In *Kansas City Gas & Electric Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985), the inspector filed reports with his supervisor detailing quality assurance problems and was terminated on the same date that he raised safety concerns. The case of *Passaic Valley Sewerage Commissioners v. U.S. Dep't of Labor*, 992 F.2d 474 (3rd Cir. 1993), which also is cited by the complainant, involved the employer's chief of laboratory and pollution control who was highly critical of sampling procedures in the sewage treatment facility. In fact, the whistleblower involved in that case filed written complaints with his employer about cost efficiency, scientific reliability and violations of the Clean Water Act. Thus, all of the circuit cases cited by the complainant involved internal reporting to the employees' managers and supervisors of potential violations of federal environmental statutes.

The decisions of the Secretary of Labor cited by the complainant involved fact situations comparable to those involved in the cases appealed to the federal circuits. The case of *Smith v. Norco Technical Services*, Case No. 85-ERA-17 (Sec'y Dec. and Order Oct. 7, 1987), involved an instrument control technician who discovered grounding problems in testing electrical systems and threatened to go to the quality assurance control department, as well as the Nuclear Regulatory Commission. The complainant involved in the case of *Francis v. Bogen*, Case No. 86-ERA-8 (Sec'y Dec. and Order, April 1, 1988), had filed written field questionnaires with his employer raising issues about the installation of instruments and equipment. The case of *Nunn v. Duke Power Co.*, Case No. 84-ERA-27 (Sec'y Dec. and Order July 30, 1987) involved the reporting of several safety concerns about welding and construction. The complainant in that case not only raised the safety complaints with supervisory personnel but he also contacted a legal intervenor in a company undergoing a licensing proceeding under the Atomic Energy Act, as well as the Government Accountability Project.

The precise nature of the facts involved in the final case cited by the complainant on this matter [*Willy v. The Coastal Corporation*, Case No. 85-CAA-1 (Sec'y Dec. and Order June 4, 1987)], is not set forth in the Secretary's decision. However, the decision does indicate that the case involved the complainant's reporting of possible violations of environmental laws internally to his employer. Thus, all of the cases cited by the complainant on this argument involved the reporting of possible violations of environmental laws.

It appears that David Hermanson's internal expressions of concern were personal in nature in that he was concerned about the adequacy of his personal protection equipment and whether a permanent physician should be working at Vertac. Neither of these concerns was formal. Moreover, the complainant's question regarding the physician appeared to be a general discussion with the compliance officer, while the former was a verbal expression of personal concern about the safety of the working conditions at the Vertac site. I agree with the complainant that it is not important that his request for a respirator was granted in order for it to constitute protected activity. It is important, however, that his expression of concern did not relate to a violation of a statute which could affect the environment in general. I therefore find that Mr. Hermanson's complaints were not based on conditions constituting reasonably perceived violations of the environmental statutes applicable to this case. Thus, these internal complaints fall outside of the umbrella of activity protected by the whistleblower provisions of the pertinent statutes and regulations.

The remaining proven safety concern expressed by David Hermanson also was informal in nature. Complainant was present when a co-worker caused a forklift to pierce a protective liner which was a few inches below the soil level at the Vertac site. Mr. Hermanson's supervisor testified that the complainant stated that the protective liner was placed in the soil to provide protection from a major waste spill which ultimately proved to be incorrect. Again, I do not believe the employee protection provisions of the environmental statutes were intended to cover such casual comments. It is unreasonable to conclude that such conversation is an indication on the part of the employee to initiate proceedings or investigations such as those mentioned in the pertinent employee protection provisions. It is even more unreasonable to conclude that such a conversation could constitute the raising of a safety concern for which a vengeful employer would take adverse action against an employee. I therefore find that the complainant's mere expression of his belief as to the use of a particular piece of equipment at a Superfund site does not constitute an internal safety complaint for which protection is afforded under the whistleblower provisions of the pertinent environmental statutes. Thus, I conclude from the evidence presented to me that the complainant has not established that he was involved in a "protected activity" within the meaning of the pertinent environmental statutes and regulations.

Discrimination

If any one of these three internal expressions of concern by the complainant could be construed as activity protected by the pertinent environmental statutes and regulations, it follows that MK had knowledge of the activity. VSC's project manager indeed was involved in the incident relating to Mr. Hermanson's request to wear a respirator. The other two expressions of concern were to Mr. Hermanson's supervisor and a safety compliance officer of VSC, both of whom would be considered a member of management.

Assuming *arguendo* that Mr. Hermanson did engage in protected activity when he made his internal safety complaints to VSC, he next would have to prove that the cause of his discharge was the protected activity. *McCuistion v. Tennessee Valley Authority*, Case No. 89-ERA-6, (Sec. Dec. and Order, Nov. 13, 1991). To accomplish this, complainant must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse

action. I find there is no direct evidence of discrimination in this case. Complainant's counsel argues to the contrary, pointing to the several disciplinary notices issued to Mr. Hermanson over the years. I conclude that such evidence, by itself, does not support Mr. Hermanson's position in this regard. MK offered evidence to show that Mr. Hermanson's actions justified the issuance of the disciplinary notices, in the minds of the personnel involved. Such evidence tends to support MK's reason for terminating David Hermanson rather than show that the company acted in a discriminatory manner by issuing the notices.

Circumstantial evidence may raise the inference that a protected activity was the likely reason for an adverse action, "i.e. 'proof that the discharge followed the protected activity so closely in time as to justify an inference of retaliatory motive.'" *Schweiss v. Chrysler Motor Corp.*, 987 F.2d 548, 549 (8th Cir. 1993) (quoting *Rath v. Selection Research, Inc.*, 978 F.2d 1087, 1089 (8th Cir. 1992)). In this regard, complainant's counsel first argues that Mr. Hermanson's termination occurred within six days following his internal inquiries to management and the URS shift engineer about the February 18, 1994 waste spill. Such argument is misplaced because I found Mr. Hermanson's allegations regarding this incident are not credible. I reiterate that the principal persons involved in this matter credibly contradicted the complainant's version of the facts. I therefore find that this incident cannot be used by the complainant in an attempt to show a connection between any protected activity and the adverse action by VSC.

Complainant's counsel also argues that it is an extraordinary "coincidence in time" that a co-worker of Mr. Hermanson also was terminated on March 1, 1994, only a few days subsequent to that employee's engagement in a protected activity. The facts involved in that co-worker's termination are not before me and apparently are the subject of other litigation. Therefore, there is no evidence in this case supporting this allegation of Mr. Hermanson.

Mr. Hermanson also maintains that the absence of points against him under VSC's disciplinary system just prior to his termination, together with the absence of any warning prior to his firing, evidences the employer's retaliatory motive or animus. It is true that Mr. Hermanson did not have any points under VSC's disciplinary system immediately prior to his termination. This is because the system provides for a removal of points 90 days subsequent to the incident for which points are assessed. I find that this fact, alone, is not enough to convince me that Mr. Hermanson's termination was a product of retaliation. It is significant to note that the complainant had a long list of violations of conduct or safety rules in his personnel file. Also, he was involved in two incidents within nine months of his termination which were described by his supervisors as demonstrating negligence or carelessness. The one involving his operation of a backhoe could have resulted in an accident but for the alertness of another employee. The other incident involved Mr. Hermanson and a co-worker using the Hotsy to cool down which resulted in the assessment of points and a warning by management that if it occurred again, the employees would be terminated. Thus, Mr. Hermanson had, in fact, been warned about the improper use of the Hotsy. I agree with complainant's counsel that Mr. Hermanson was not a perfect employee but disagree that his termination at a time when he had no points on his record under VSC's disciplinary system raises an inference that any protected activity on the part of the complainant was the likely reason for his discharge.

Complainant's counsel also attacks the adequacy of VSC's investigation of the March 1, 1994 incident in arguing that Mr. Hermanson's termination was retaliatory. They add that the evidence demonstrates that VSC's management had already decided to fire the complainant prior to conducting any meaningful investigation. While it is unclear from the evidentiary record whether complainant's supervisor prepared the report regarding this incident prior to or after Mr. Hermanson had left the premises, I find that the evidence proves that VSC's investigation of the incident was adequate prior to the time Mr. Hermanson was fired. The supervisor not only

discussed the matter with Mr. Hermanson, he returned to the area where the incident occurred and examined the Hotsy and the metal which the complainant was cleaning at the time of the injury. He also talked to other employees about Mr. Hermanson's handling of the Hotsy prior to the incident. After discussing the situation with the complainant and his supervisor, the safety manager discussed the matter with the project manager and they concurred that Mr. Hermanson's termination was justified. I therefore find that the complainant has not demonstrated any retaliatory motive through the manner in which the investigation of the March 1, 1994 incident was conducted.

Mr. Hermanson's counsel next weakly argues that the manner in which Mr. Hermanson was disciplined demonstrates wrongful motive or animus. They contend that the March 1, 1994 incident was an accident resulting from the employer's negligence because Mr. Hermanson was using decontamination procedures and equipment that his supervisors instructed him to use. They also again point out that MK admitted that no points are to be assessed for accidents.

Complainant's arguments in this regard are twisted. The record clearly proves that VSC employees were not to use their feet to hold tools and equipment in cleaning them with the Hotsy. Also, the SOP applicable to the Hotsy clearly indicates that the spray is not to be pointed toward a body part. VSC's investigation of the March 1, 1994 incident led Mr. Hermanson's supervisor and the safety manager to conclude that Mr. Hermanson injured himself because he was holding a pipe with his foot while attempting to clean it with the Hotsy, which is in clear violation of company policy in the SOP. It is true that the incident could be described as an accident and it is also true that VSC conceded that employees are not disciplined for accidents. However, the record clearly shows that the complainant was not terminated because of the accidental nature of the incident but for his negligence or carelessness in the use of the equipment. VSC's management did not depart from their disciplinary policies in terminating Mr. Hermanson for what they concluded was the negligent use of equipment resulting in injury.

Mr. Hermanson's counsel maintained throughout the hearing and on brief that VSC's management has a hostile attitude toward employees who raise safety concerns. They produced substantial testimony and documentary evidence in an attempt to show that management acted in a hostile or retaliatory manner against anyone who questioned safety. I found that much of this evidence was irrelevant to this proceeding. However, some of the testimony offered by the complainant does demonstrate that some employees interpreted the project manager's statement that employees should leave if they were not going to follow company rules as demonstrating a hostile attitude against employees who questioned safety. It is also true that some of the employees considered VSC's attempt to limit communications between them and URS officials as restricting the employees' ability to raise safety concerns. However, I am satisfied from the evidence presented to me by MK that these few employees have misinterpreted the company's policies. The project manager explained each of these policies and I found his explanations more plausible than those offered by complainant's counsel. I therefore find that the evidence presented on behalf of Mr. Hermanson does not demonstrate that VSC's management has a hostile attitude toward employees who raise safety concerns about the Vertac facility.

Complainant argues that there is additional evidence in the record of retaliatory motive and inherently discriminatory conduct on the part of the respondent. Examples of such conduct, Mr. Hermanson's counsel contend, are the company's refusal to disclose to workers the high level of toxic chemicals in the air on-site and that employees are continuously exposed to chemical vapors and salts. Counsel goes on to allege that the workers are asked to intentionally conduct misleading wipe samples to allow contaminated materials to be taken off-site. They also maintain that VSC took extraordinary efforts to avoid outside parties from discovering any incriminating information about the incinerator operation.

These arguments of counsel are meritless. There is no credible evidence in the record proving any of these allegations. Indeed, complainant's counsel should have closely considered the quality of the evidence which they offered on this issue and, in good taste, abandoned their position as to MK's policy regarding compliance with environmental statutory requirements. I find that these contentions, as well as the others advanced by the complainant, do not raise an inference that Mr. Hermanson's expressions of concern regarding safety were the likely reason for his termination by VSC.

Reason for Adverse Action

If complainant had been successful in proving a causal connection between his alleged protected activity and his dismissal, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse action. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *McCustion v. Tennessee Valley Authority*, Case No. 89-ERA-6, (Sec. Dec. and Order, Nov. 13, 1991). In this regard, MK's counsel contend that the evidence overwhelmingly establishes that the company possessed a legitimate and non-discriminatory reason for terminating David Hermanson; he was an unsafe worker. I agree that the record supports this position. Some witnesses who were asked about the complainant's work habits stated he was a hard worker but needed specific instructions. Others candidly said he was unsafe. The documentary record also supports this position as Mr. Hermanson's personnel file is replete with safety violations. In the nine months preceding his termination, he was more than once involved in the operation of equipment which was described by his supervisors as negligent or careless. Moreover, he was caught by the project manager in June of 1993 in an incident involving the improper use of the Hotsy and was warned that he would be terminated if such action occurred again. Thus, MK clearly had a legitimate business reason for terminating David Hermanson on March 1, 1994 as a result of the incident involving the Hotsy. Considering Mr. Hermanson's safety record, I believe the evidence demonstrates that MK's management showed considerable patience with the complainant in view of the nature of their operation at Vertac.

Pretextual

Complainant contends that the reason proffered for his termination should be considered pretextual. *See NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *NLRB v. Wright Line, a Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), *aff'd*, 662 F.2d 889 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). It is argued by the complainant that MK's raising of the violations set forth in Mr. Hermanson's personnel file proves the company is attempting to change the reason for Mr. Hermanson's termination. Counsel contend that the respondent premised the adverse action against their client on an intentional violation of a company rule and now maintain that the firing was due to another reason. Thus, they argue that the proffered reason for the adverse action was pretextual.

Again, I disagree with the position advanced on behalf of the complainant. It is true that VSC's safety manager did testify that Mr. Hermanson's termination was due to an intentional violation of a safety rule. However, a further examination of his testimony leads me to conclude that such characterization was due to his inability to distinguish between an intentional and a negligent act. On the other hand, the documentary evidence clearly shows that the reason for Mr. Hermanson's termination was the careless or negligent use of the Hotsy which resulted in an injury to an employee. The circumstances advanced by the respondent demonstrate complainant's failure to adhere to conduct and safety rules and, thus, support the basis of the termination rather than prove that the reason given for Mr. Hermanson's termination is pretextual. *Id.*

Complainant again argues that the inadequacy of VSC's investigation of the March 1, 1994 incident demonstrates that the company's reason for terminating Mr. Hermanson is pretextual. I previously addressed this inquiry in regard to complainant's argument that VSC had a retaliatory motive in terminating the complainant. For the reasons set forth above, I find that the evidence establishes that the investigation by management prior to Mr. Hermanson's termination was reasonable and that the conclusions reached from that investigation support the proffered reason for the complainant's termination.

Dual Motive

Respondent has met its burden of proving a legitimate, non-discriminatory reason for terminating Mr. Hermanson. However, the complainant contends that his involvement in a protected activity played some part in his discharge. In support of this "dual motive" theory for the adverse action, his counsel contend that the evidence proves disparate treatment of Mr. Hermanson by VSC management versus that shown to similarly situated employees. They maintain proof in this regard demonstrates a retaliatory motive against the complainant.

Evidence was offered by the complainant on five instances which they contend proves unequal treatment of employees by VSC. After considering that evidence and the explanatory evidence offered in rebuttal by the respondent, I conclude that the incidents were not significant enough to even justify findings of fact. (*Compare* CX 19-21, 26 and 43 with Tr. 833-838, etc.) Instead, I have found from other evidence that VSC's management fired another employee prior to Mr. Hermanson for that employee's improper use of the Hotsy. Therefore, I conclude that the complainant has not shown disparate treatment between him and similarly situated employees. *Mackowiak v. University Nuclear Systems, Inc.*, Case No. 82-ERA-8 (Sec'y Dec. and Order, April 29, 1981), *remanded on other grounds*, 735 F.2d 1159 (9th Cir. 1984).

The evidence simply does not show that the respondent had a dual motive in terminating the complainant. Assuming *arguendo* that Mr. Hermanson was involved in protected activity while employed at VSC, the evidence convinces me that Mr. Hermanson's discharge would have occurred on March 1, 1994, even if the complainant had not been involved in such activity. David Hermanson was terminated solely for a legitimate, non-discriminatory business reason.

In conclusion, I find that Mr. Hermanson's oral internal complaints regarding safety are not protected by the statutes or regulations involved in this proceeding. However, even if that action constituted protected activity, I find that he has not established that he was discharged from his employment because of that protected activity. Therefore, MK did not discriminate against David Hermanson in terminating him on March 1, 1994.

ORDER

For the above-stated reasons, IT IS HEREBY RECOMMENDED to the Secretary of Labor that the complaint of David Hermanson be dismissed.

_____
DONALD W. MOSSER
Administrative Law Judge